No. 80-685

In the Supreme Court of the United States

OCTOBER TERM, 1980

THRIF-TEE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Bull v. *United States*, 295 U.S. 247 4

Crismon v. *United States*, 550 F. 2d 1205, cert. denied, 434 U.S. 807 3

Morse v. *United States*, 46 A.F.T.R. 2d para. 80-5030 (Ct. Cl. June 6, 1980) 3

Schrader v. *IRS*, 35 A.F.T.R. 2d 686 3

United States v. *Garbutt Oil Co.*, 302 U.S. 528 4

Zarnow v. *Commissioner*, 48 T.C. 213 4

Statute and regulation:

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6411 ..... 3, 4

Section 6411(a) 3, 4

Section 6511 ..... 3, 4

Section 6511(d)(2) 2, 3, 4

Section 7422 ..... 2, 4

Treasury Regulations on Income Tax (26 C.F.R.):

Section 1.6411-1(b)(2) 3

Section 1.6411-2(b) 3

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The question presented in this federal income tax case is whether the courts below properly dismissed petitioner's refund suit because it failed to file a claim for refund within the statutory period.

The pertinent facts may be summarized as follows: On or about October 1, 1973, petitioner alleges that it filed an Application for Tentative Carryback Adjustment (Form 1139) reflecting a net operating loss carryback from the taxable year ended April 30, 1973, to the year ended April 30, 1971. On June 2, 1977, the Internal Revenue Service received a letter from petitioner's accountant requesting action on the Application for Tentative Carryback Adjustment (Form 1139). This was the first inquiry from petitioner regarding the Form 1139 allegedly mailed 44 months earlier. The Internal Revenue Service treated this letter as an informal claim for refund, denied it as untimely filed, and

issued a statutory notice of disallowance which was mailed to petitioner by certified mail on December 30, 1977. Petitioner thereupon brought this suit for a refund in the United States District Court for the Western District of North Carolina. The district court dismissed the suit for lack of subject matter jurisdiction. In its view, even on the assumption that petitioner mailed a Form 1139 on October 1, 1973, such an application for a tentative carryback adjustment could not be treated as a claim for refund that would have given the court jurisdiction to hear the case. The court of appeals affirmed (Pet. App. 2b).

1. The decision below correctly dismissed petitioner's refund suit. Section 7422 of the Internal Revenue Code of 1954 (26 U.S.C.) prohibits suits for the recovery of income taxes unless the taxpayer has duly filed a timely claim for refund or credit with the Secretary of Treasury or his delegate. Section 6511(d)(2) of the Code requires a corporate taxpayer claiming a credit or refund attributable to a net operating loss carryback to file its claim for refund or credit on or before the 15th day of the 39th month following the end of the taxable year of the net operating loss.

Here, petitioner's net operating loss occurred in its taxable year ended April 30, 1973. No claim for refund would have been timely if it were filed after July 15, 1976. Petitioner did not file a claim for refund before this date. Moreover, the letter received by the Internal Revenue Service on June 2, 1977, which it treated as an informal claim for refund, was untimely under Section 6511(d)(2). The district court therefore lacked jurisdiction over petitioner's suit.

Petitioner argues (Pet. 4-5) that its application for a tentative carryback adjustment should be considered as an informal claim for refund, satisfying the jurisdictional requirement of Section 7422, and that, in any event, the government should not be permitted to raise the jurisdic-

tional defense because the Internal Revenue Service failed to act on petitioner's application within the time prescribed by statute.

But an application for a tentative carryback adjustment is not, and cannot be treated as, a claim for refund. Indeed, the statute authorizing the application expressly prohibits such treatment. It explicitly provides that: "An application under this subsection shall not constitute a claim for credit or refund" (26 U.S.C. 6411(a)).

The tentative carryback adjustment provided by Section 6411 is a summary procedure designed to afford a taxpayer a speedy refund during a potentially critical financial period, namely, immediately after it has undergone a loss year. *Schrader* v. *IRS*, 35 A.F.T.R. 2d 686, 687 (W.D. Ky. 1975); H.R. Rep. No. 849, 79th Cong., 1st Sess. 21 (1945). Accordingly, if a Form 1139 is filed within 12 months of the close of such a year, the Internal Revenue Service is bound within 90 days to pay the amount shown due, subject only to correction of mathematical errors. Section 6411(b); Treasury Regulations on Income Tax, Section 1.6411-2(b) (26 C.F.R.). If it subsequently determines that the refund was improper to any extent, the Service may then determine the appropriate deficiency. Section 6213.

Thus, the nature and function of a Section 6411 application are very different from that of a Section 6511 claim for refund, reflecting important differences in how the forms are treated by the Internal Revenue Service and in their impact on dealings between the government and the taxpayer. *Crismon* v. *United States*, 550 F. 2d 1205, 1206 (9th Cir.), cert. denied, 434 U.S. 807 (1977); *Morse* v. *United States*, 46 A.F.T.R. 2d, para. 80-5030 (Ct. Cl. (June 6, 1980)). An application under Section 6411 presumably will receive only a cursory examination for computational errors, and any actions on it is never final.

Hence, Treasury Regulations on Income Tax, Section 1.6411-1(b)(2) expressly warns, echoing the statute, that an application is not a claim for refund for purposes of Section 6511, and advises taxpayers that they may file a claim for refund before, simultaneously with, or after filing an application under Section 6411.

Moreover, a failure to respond to a taxpayer's application under Section 6411 cannot prevent the government from raising a jurisdictional defense under Section 7422. If it could, the Internal Revenue Service would have the authority to confer jurisdiction on the courts in cases where Congress refused to confer such jurisdiction. See *United States* v. *Garbutt Oil Co.*, 302 U.S. 528, 533-535 (1938); *Bull* v. *United States*, 295 U.S. 247, 260-261 (1935). Although Section 6411 states that the Secretary of Treasury or his delegate *shall* make a limited examination of the application for computational errors and *shall* credit or refund the amount applied for within 90 days from the date when the application was filed, it provides no sanctions for the failure of the Secretary or of his delegate to perform those acts within 90 days. See *Zarnow* v. *Commissioner*, 48 T.C. 213 (1967). There is accordingly no statutory authorization to punish the government for lapses under Section 6411 as an informal claim under Section 6511.

Finally, the factual circumstances of this case do not in any event warrant affording petitioner any relief. Petitioner permitted 44 months to elapse before making any inquiries about an application that, in the normal course of events and as petitioner claims it expected, would be acted on within 90 days of its filing date. Petitioner could have filed an effective claim for refund at any time during the first 33 of these 44 months. The Internal Revenue Service did not lull petitioner into failing to file a refund claim. Its present predicament results from its own negligent failure to act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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